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Proceedings

SUPREME COURT NEW YORK COUNTY
TRIAL TERM PART 31

-----x
THE PEOPLE OF THE STATE OF NEW YORK:
INDICTMENT #

580/06

AGAINST

CHARGE

110/235.22

Alan Schaefer,

Defendant.

-----x
Calendar Call

100 Centre Street
New York, New York 10013
1/25/07

B E F O R E:

HONORABLE JAMES YATES

Justice of the Supreme Court

A P P E A R A N C E S:

For the People:

ROBERT MORGENTHAU ESQ.,

New York County District Attorney

One Hogan Place

New York, New York 10013

BY: LANCE FLETCHER, ESQ

Assistant District Attorney

For the Defense:

RICHARD GREENBERG ESQ

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2 THE CLERK: Calendar number 1,
3 Alan Schaefer, 580 of 2006.

4 MR. GREENBERG: Richard Greenberg
5 for the defendant, Alan Schaefer, who
6 has been excused.

7 MR. FLETCHER: For the People
8 Lance Fletcher: Good morning.

9 THE COURT: Good morning. I had
10 been waiting for the various appeals
11 on this same issue. I think at this
12 point you don't want me to wait
13 anymore.

14 MR. GREENBERG: I can give you a
15 status report of where both courts
16 are. The case in the Court of
17 Appeals, Coslow, will be argued on
18 March 20th. The First Department has
19 put off the hearing from the People's
20 appeal obviously until the Court of
21 Appeals decides.

22 THE COURT: So everyone waits for
23 the Court of Appeals.

24 MR. GREENBERG: Which probably
25 won't be until June.

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2 THE COURT: I might as well give
3 you a decision then.

4 MR. GREENBERG: I think that is
5 why the case was on.

6 THE COURT: Remind me. It has
7 been so long since I looked at this.

8 MR. GREENBERG: The first count
9 is attempted dissemination.

10 THE COURT: That one actually had
11 pictures?

12 MR. GREENBERG: No photographs in
13 this case. I think you may be
14 thinking of another case.

15 THE COURT: This was just oral;
16 nothing was in pictures?

17 MR. GREENBERG: Yes.

18 THE COURT: I'm bound to dismiss
19 that based on the Second Department
20 case.

21 MR. GREENBERG: That is my
22 understanding of the law.

23 THE COURT: So I will do that.
24 Second and third count were on the --

25 MR. GREENBERG: Sexual abuse

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2 --attempted sexual abuse.

3 THE COURT: Two issues, whether
4 it was an impossible crime and
5 whether it was close enough to make
6 an attempt.

7 MR. GREENBERG: And whether
8 attempting to kiss somebody is
9 attempted sexual abuse in the second
10 degree. That was one.

11 THE COURT: Aren't there already
12 appellate cases that call the mouth
13 an intimate part?

14 MR. GREENBERG: As we briefed it
15 this is an open question. No,
16 there are not. There is a division
17 of authority among lower courts.

18 THE COURT: Fine. I didn't have
19 time to write on it.

20 Endangering the welfare as to the
21 14-month old baby was --

22 MR. GREENBERG: He came with his
23 child.

24 And the attempted endangering of
25 an undercover police officer.

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2 THE COURT: All right, so I will
3 just give you a ruling as best I can
4 on those issues.

5 On count one I am bound by the
6 Second Department case so unless it
7 is overruled by the Appellate
8 Division or the First Department I
9 dismissed Count 1.

10 Count 2, I don't believe that the
11 attempted sexual abuse statute is
12 meant to include a request to kiss a
13 person, mouth to mouth.

14 On the third count, the attempted
15 sexual abuse, I do agree that
16 attempted sexual abuse is an
17 impossible crime under Court of
18 Appeals logic but the First
19 Department did distinguish it and
20 until the Court of Appeals gets
21 around to addressing the decision I
22 am bound by what they said so I will
23 sustain Count 3 on the endangering.

24 I agree with you that meeting in
25 a public park where no dangerous

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2 activity is taking place does not
3 constitute endangering the welfare of
4 a child on count four. I will
5 dismiss that. On the attempt, the
6 endangering as to the conversations "
7 with the alleged victim, I will
8 sustain that one of the. So, the net
9 result is that Count 1 and 2 are
10 dismissed. Count 3 is sustained.
11 Count 4 is dismissed. Count 5 is
12 sustained. I am assuming the People
13 want a 30-day stay.

14 MR. FLETCHER: People request a
15 trial date of February 13.

16 THE COURT: I am sorry, what is
17 your name again?

18 MR. FLETCHER: Lance Fletcher.

19 THE COURT: Mr. Fletcher, my
20 guess is you want to consider for
21 30-days whether you want to appeal
22 this. Instead of putting it on for
23 trial we will put it on for 30-days
24 for the People to exercise their
25 options. That will be February 21st

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2 is close. It is a calendar day.

3 MR. GREENBERG: That would be
4 great.

5 THE COURT: That is almost
6 30-days.

7 MR. GREENBERG: May I just remind
8 you of one last point which you
9 haven't ruled on. This was a
10 question of combination really of
11 what I believed to be prosecutorial
12 misconduct and dismissal of the
13 remaining B misdemeanors, in the
14 interests of justice which was the
15 release of otherwise Grand Jury
16 protected material which was attached
17 to their VDF form and picked up in
18 the papers and presented to a hearing
19 officer from the Department of
20 Education and the basis for my
21 client's loss of his job.

22 The People believe I think that
23 they can simply hand out evidence
24 that was in the Grand Jury and they
25 attempt to draw a distinction between

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2 what was subpoenaed to the Grand Jury
3 and what was presented by a police
4 officer and I don't think that is a
5 distinction.

6 THE COURT: Where was it
7 distributed?

8 MR. GREENBERG: As I say not only
9 distributed publicly filed and picked
10 up in the newspaper but the officer
11 who recorded or was engaged in the
12 computer conversation with my client
13 presented the transcript of the INSTA
14 messages to a hearing examiner at the
15 Department of Education and on the
16 basis of that, he found probable
17 cause to fire my client.

18 THE COURT: Your argument is
19 there should have been a
20 particularized application.

21 MR. GREENBERG: Exactly. While I
22 would not have thought of making the
23 argument to the felony count,
24 dismissal in the interest of justice
25 is about the only relief that I am

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2 asking for, other than a kind of
3 stern warning from the Court.

4 THE COURT: An Article 78, the
5 dismissal is going to be an
6 Article 78.

7 MR. GREENBERG: As I understand
8 it, I don't represent people
9 generally before the Department of
10 Education but so long as there is any
11 sexually oriented charge still
12 surviveing, he has absolutely no
13 chance of regaining his job. And if
14 you mean will I seek review in the
15 Appellate Division because he relied
16 upon it, I think not, although it is
17 a nice idea.

18 THE COURT: Am I the right place
19 to bring that argument?

20 MR. GREENBERG: You are certainly
21 the right place to indicate something
22 on the record to the People they
23 can't wily nilly release Grand Jury
24 material because they want it to get
25 out so it can be used to fire a

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2 public employee.

3 THE COURT: Was the material
4 obtained through a search warrant?

5 MR. GREENBERG: No.

6 THE COURT: Or a subpoena by a
7 Grand Jury?

8 MR. GREENBERG: No it was not.

9 THE COURT: If the police
10 obtained something that is not
11 through a subpoena by the Grand Jury//
12 or a search warrant, why would the
13 prosecutor have an obligation not to
14 disclose it, other than the normal
15 obligation of not tainting a pending
16 criminal case?

17 MR. GREENBERG: I believe the law
18 is, your Honor, that when you produce
19 evidence to the Grand Jury it becomes
20 cloaked with Grand Jury secrecy,
21 particularly police investigative
22 material.

23 It is inconceivable to me they
24 could do an investigation, obtain
25 highly sensitive material, present it

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2 to the Grand Jury and then release it
3 publicly.

4 THE COURT: Prior to the time the
5 Grand Jury occurred, the mere fact
6 that it was part of the evidence in
7 the Grand Jury, cloaking it --

8 MR. GREENBERG: I believe that is
9 the law. We cited an authority.

10 THE COURT: I would have to look
11 at that.

12 MR. GREENBERG: We are not asking
13 you to.

14 In light of all the
15 circumstances, including the loss of
16 his job, his dying mother.

17 THE COURT: I am reserving on the
18 interests of justice application.
19 Let's see what the People want to do.
20 Instead of February 21st you said
21 there is an argument in the Court of
22 Appeals.

23 MR. GREENBERG: Court of Appeals
24 March 20th in People versus Kozlow.

25 THE COURT: Maybe I should put it

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2 over until after that and we will see
3 what the Court of Appeals does.

4 MR. GREENBERG: I will certainly
5 be talking to counsel for that
6 defendant and he will let me know.
7 As you know the Court of Appeals
8 doesn't decide from the bench and we
9 won't really have a decision until at
10 least June, probably.

11 THE COURT: All right.

12 MR. GREENBERG: I am happy --

13 THE COURT: Let's put it on for
14 April 5th for control then.

15 MR. GREENBERG: Thank you very
16 much.

17 THE COURT: If the People, by the
18 way, if the People decide that they
19 are not going to appeal and they
20 would rather advance the case for
21 trial with the surviveing counts you
22 can advance it.

23 MR. GREENBERG: I believe Mr.
24 Dougherty has represented to me that
25 he would certainly be filing a notice

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of appeal. For whatever it is worth
I'm representing that. But I will
let him know;.

COURT CLERK: One two and four
were dismissed.

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Certified to be a true and
accurate transcript of my stenographic
notes

Bonnie French, Court Reporter